



Comptroller General  
of the United States

Washington, D.C. 20548

146172

## Decision

**Matter of:** Janel Tohm  
**File:** B-246577  
**Date:** March 19, 1992

Janel Tohm for the protester.  
Paula D. Muller, Department of Agriculture, Farmers Home Administration, for the agency.  
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest concerning rejection of quotation for lack of a valid state contractor license is sustained since the rejection was, in fact, a determination that a small business offeror was nonresponsive--a matter which was required to be referred to the Small Business Administration for certificate of competency review but was not.

### DECISION

Janel Tohm protests the rejection of her low quotation under request for quotations (RFQ) No. 36-00-1-75, issued by the Department of Agriculture, Farmers Home Administration (FmHA) as a small purchase set-aside for emerging small businesses to repair two homes in the agency's New Mexico inventory of properties. Ms. Tohm argues that her quotation was improperly rejected because it lacked a valid New Mexico contractor's license.

We sustain the protest.

The RFQ was issued on September 26, 1991, seeking quotations by October 11. The only reference to a specific licensing requirement consisted of a blank space, without instruction, in the schedule of items entitled "New Mexico Contractor License Number."

Four quotations were received. The protester's quotation was low and included a New Mexico identification number for a license issued to a firm that had been a joint venturer with the protester on earlier FmHA procurements. On October 22, award was made to the firm submitting the second-low quotation. By letter dated October 24, the agency informed Ms. Tohm that the license referenced in her

quotation had expired and that, therefore, her quotation had not been "considered for award since it is FmHA New Mexico's policy to only consider licensed contractors for major repair work." This protest was filed on November 7. Since it was not filed within 10 calendar days after award, contract performance (which was scheduled to be completed within 45 days of award) was permitted to continue. See 31 U.S.C. § 3553(d)(1) (1988).

The protester principally alleges that: (1) New Mexico law does not require state contractor licenses for work done under contract with the federal government; (2) the agency's New Mexico licensing policy was never made available to her in writing, does not cover repair work similar to that called for by the RFQ, and was not properly incorporated into the RFQ; and (3) her possession of a current contractor license from North Dakota and her successful record of performance in that state for 9 years with FmHA projects should have resulted in a finding that she was responsible.

FmHA essentially argues that: (1) the agency may require specific local licenses whether or not they are required by the State of New Mexico; (2) Ms. Tohm was orally advised of the agency's policy requiring New Mexico licenses prior to the issuance of the RFQ; and (3) the decision to exclude her quotation from consideration was consistent with procedures governing small purchases.

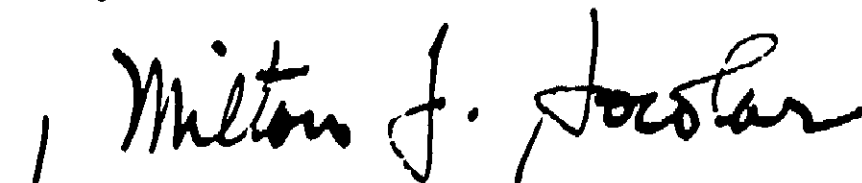
Agencies may require, through appropriate solicitation provisions, that a contractor performing work for the government have specific state licenses even though such licenses are not legally required to perform the work called for in the solicitation. Restec Contractors, Inc., B-245862, Feb. 6, 1992, 92-1 CPD ¶ \_\_\_\_\_. While we think the RFQ in this case was less than clear in requiring a New Mexico license, the protester does not deny that she was orally advised of the agency's licensing policy prior to submitting a quotation and she included a New Mexico contractor license number in her quotation in an apparent attempt to conform with that policy.

Nevertheless, FmHA improperly rejected the protester's quotation. Licensing requirements of the type contained in the RFQ concern an offeror's responsibility, see Tri-S, Inc., B-226793.2, June 26, 1987, 87-1 CPD ¶ 634, and as such actual compliance need only be accomplished by the start of contract performance. See Astro-Med, Inc., B-232633, Dec. 22, 1988, 88-2 CPD ¶ 619. In such cases, the focus of a contracting officer's responsibility determination should be whether or not a prospective awardee has the ability to obtain the license in question in time to perform the contract. Id.

Where, as here, an agency determines that a small business will not be able to meet a licensing requirement, the matter must be referred to the Small Business Administration (SBA) under its exclusive certificate of competency (COC) jurisdiction so that SBA can review the contracting officer's conclusion that the firm will not be able to comply with the requirement by the time of contract performance. 15 U.S.C. § 637(b)(7) (1988); Astro-Med, Inc., supra. Such referrals to SBA are required even in the case of procurements conducted under small purchase procedures. Federal Acquisition Regulation §§ 13.104(h) and 19.602-1(a); J. Johnson Enter., B-234245, May 18, 1989, 89-1 CPD ¶ 478.

The record does not reflect that FMHA referred its decision concerning the protester's responsibility to the SBA for review as required. Accordingly, we sustain the protest. We would normally recommend that the matter now be referred to the SBA for COC consideration, but such corrective action is not practical in this case since the contract has already been fully performed. Under these circumstances, we find that the protester is entitled to recover the reasonable costs of preparing her quotation and pursuing her protest. See J. Johnson Enter., supra.<sup>1</sup>

The protest is sustained.

  
for Comptroller General  
of the United States

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<sup>1</sup>The protester has requested reimbursement for lost profits; however, even where a firm has been wrongfully denied award of a contract, there is no legal basis for this Office to allow recovery of lost profits. See Ralph Turnbull--Claim for Costs and Lost Profits, B-238399, Feb. 12, 1990, 90-1 CPD ¶ 183.